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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-459

SLOAN, ET AL.

v.

LEMON, ET AL.

No. 72-620

CROUTER

v.

LEMON, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the district court (App. 37a–56a, 87a) is reported at 340 F. Supp. 1356.

JURISDICTION

The judgment of the district court was entered on July 21, 1972 (App. 87a). The notices of appeal were

filed in No. 72–459 by appellants Jose Diaz, *et al.* on August 8, 1972, and by Grace Sloan on August 14, 1972, and in No. 72–620 on August 21, 1972. Probable jurisdiction was noted on January 22, 1973 (App. 93a). The jurisdiction of this Court rests on 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, * * *.

The Pennsylvania Parent Reimbursement Act for Nonpublic Education, 24 Pa. Stat. Ann. § 5701 *et seq.* is set forth at App. 56a–63a.

QUESTION PRESENTED

Whether the Pennsylvania Parent Reimbursement Act for Nonpublic Education, under which the State reimburses parents for a portion of the tuition fees they have paid for sending their children to nonpublic (including religiously-affiliated) schools violates the Establishment Clause of the First Amendment, which applies to the States under the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

It is the policy of the United States to improve the quality of education and to promote the maximum availability and utilization of educational resources, while respecting the rights of parents to send

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their children to nonpublic schools which they believe best meet their children's needs. Nonpublic (including religiously-affiliated) schools have a major role in American education. They relieve the State of the substantial financial burden that would result if the children now attending nonpublic schools were to transfer to the public schools. They make possible the implementation of a diversity of educational philosophies within a single community—a diversity which enriches and strengthens the educational system.

As the President stated in his message to Congress on Educational Reform on March 3, 1970:

> * * * The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our public school system. The non-public schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results.
>
> Should any single school system—public or private—ever acquire a complete monopoly over the education of our children, the absence of competition would neither be good for that school system nor good for the country. The non-public schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wider range of possibilities for education experimentation and special

opportunities for minorities, especially Spanish-speaking Americans and black Americans.

Up to now, we have failed to consider the consequences of declining enrollments in *private* elementary and secondary schools, most of them church supported, which educate 11% of all pupils—close to six million school children. In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools.

If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970s would exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities. [H. Doc. No. 91–267, 91st Cong., 2d Sess., p. 9.]

STATEMENT

This is a suit to enjoin enforcement of the Pennsylvania Parent Reimbursement Act for Nonpublic Education, 24 Pa. Stat. Ann. § 5701 *et seq.*, on the grounds that the Act violates the Establishment and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment (App. 8a–9a).[1] The plaintiffs are individual citizens and taxpayers of Pennsylvania (one of whom, appellee Lemon, also is the parent of a Negro child attending a Pennsylvania public school) (App. 6a). The defendants are the Treasurer of Pennsylvania and

[1] The district court dismissed counts two (Free Exercise) and three (Equal Protection) of the complaint on the authority of *Lemon* v. *Kurtzman*, 403 U.S. 602 (App. 64a).

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individual residents of Pennsylvania who are parents of students in nonpublic schools (App. 6a, 17a, 20a).

The statute, which was adopted in August 1971, is based upon legislative findings that parents who send their children to nonpublic schools "assist the State in reducing the rising costs of public education" and "provide a vital service to the Commonwealth"; that "[i]n the exercise of their constitutional right to choose nonpublic education for their children, parents who support such education make a major contribution to the public welfare," but that the "immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden"; and that "[s]hould parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State," which "would be an intolerable public burden and present standards of public education would be seriously jeopardized" (App. 57a–58a).[2]

"[I]n order to reimburse parents partially for this service so vitally needed by the Commonwealth, and

[2] The legislature found that (App. 57a–58a):

> Without allowance for inflationary increase, the annual operating cost of educating in public schools, the five hundred thousand students now enrolled in Pennsylvania nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). * * *

in order to foster educational opportunity for all children," the State established "a program of Parent Reimbursement for Nonpublic Education" (App. 58a). It provides that resident parents who file a verified statement that their child has completed a school year in a nonpublic school within the State that meets the requirements of the State's compulsory school attendance law [3] and of Title VI of the Civil Rights Act of 1964 (which prohibits discrimination) are entitled to a tuition reimbursement payment of $75 for each elementary school student and $150 for each secondary school student, or, if less, the actual amount of tuition paid.[4]

Reimbursement is provided from the Parent Reimbursement Fund into which is paid 23 percent of the revenue collected from the State's cigarette tax (App. 60a). The responsibility for administering the program is in the Pennsylvania Parent Assistance Authority, which consists of five non-compensated members appointed by the governor. The Act provides that the Authority "shall exercise no direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools" (App. 60a).

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[3] Every child residing in Pennsylvania between the ages of 8 and 17 is required to attend a school in which subjects and activities prescribed by the State Board of Education are taught. 24 Pa. Stat. Ann. §§ 13-1326, 13-1327.

[4] The statement is to be filed at the completion of the school year but not later than July fifteenth. Payments are to be made not later than September fifteenth (App. 61a).

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The defendants moved to dismiss the complaint on the ground of failure to state a claim upon which relief can be granted (App. 12a, 26a, 31a). A three-judge district court concluded that "the Establishment Clause precludes state reimbursement of sums that parents have paid as tuition to schools that provide religious education" and denied the motion to dismiss (App. 55a). The court, relying on the legislative determination of policy, ruled that "the Act expresses a legitimate secular objective consistent with the Establishment Clause" (App. 43a). The court held, however, that "the Act has the primary effect of advancing religion" (App. 43a).

It stated that "the fact that aid is given to parents in itself does not prevent the subsidy from having a primary effect of supporting religious instruction and worship in church-related schools" (App. 51a), and that "the court must examine the character of the aided activity rather than the manner in which aid is given in order to determine whether the state subsidy has the primary effect of advancing religion" (*ibid.*). It concluded that since "the effect of the Act is to aid the schools * * * the failure of the state to insure that the funds are restricted to secular education or general welfare services renders the Act unconstitutional" (*id.* at 51a–52a). Finally, it held that even if 'the Act does not aid sectarian schools, we must still conclude that the Act supports religion because it aids parents in providing a religious education for their children" (App. 54a).

Based upon this opinion, the court thereafter granted the plaintiffs' motion for summary judgment and enjoined the payment of any funds under the Parent Reimbursement Act for Nonpublic Education "either directly or by way of reimbursement to parents of children attending nonpublic schools" (App. 87a).[5]

ARGUMENT

THE PENNSYLVANIA STATUTE SATISFIES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT BECAUSE ITS PURPOSE AND EFFECT ARE PRIMARILY SECULAR, AND IT DOES NOT INVOLVE EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION

INTRODUCTION AND SUMMARY

1. In a series of landmark decisions, this Court has marked out certain areas of government aid to religious institutions that are permissible under the Establishment Clause of the First Amendment, and other areas that the clause prohibits. On the one hand, the State may aid religious institutions indirectly, such as through tax exemptions (*Walz* v. *Tax Commission*, 397 U.S. 664), reimbursement of parents for bus fares paid for children attending religiously-affiliated schools (*Everson* v. *Board of Education*, 330 U.S. 1), or supplying of books to children attending such schools (*Board of Education* v. *Allen*, 392 U.S. 236). On the other hand, the Establishment Clause pro-

[5] The plaintiffs' affidavits in support of the motion for summary judgment recite only that the plaintiffs are citizens, residents and taxpayers of Pennsylvania and have purchased cigarettes and paid the Pennsylvania cigarette tax (App. 81a-83a).

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hibits any direct government aid to purely religious activities (*McCollum* v. *Board of Education*, 333 U.S. 203), and any aid to the secular aspects of religiously-affiliated schools where the government's action to insure that the funds are used exclusively for secular purposes itself involves excessive government entanglement in religion (*Lemon* v. *Kurtzman*, 403 U.S. 602). Between these two boundaries "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference" (*Walz*, *supra*, 397 U.S. at 669). The Court's function is "to define the boundaries of the neutral area between these two provisions within which the legislature may legitimately act" (*Tilton* v. *Richardson*, 403 U.S. 672, 677).

The present case is not squarely controlled by previous decisions of this Court. We submit, however, that the rationale of those decisions indicates that the Pennsylvania Parent Reimbursement Act satisfies the Establishment Clause. Under this Act the State is completely neutral in its relationship to religion. It makes no grants directly to the religiously-affiliated schools. The decision whether to send their children to such schools is made exclusively by the parents; the parents are entitled to the same reimbursement whether their children attend a nonpublic school with no religious affiliation at all (as is true of several of the defendants in the case), or one with a church affiliation. There is no State entanglement—let alone any excessive entanglement—in the operation of the schools; the State's only administrative function is to

check that the school for which tuition reimbursement is sought is accredited under State law, and to make the payment to the parents.

The Pennsylvania Act thus furthers the "benevolent neutrality" (*Zorach* v. *Clauson*, 343 U.S. 306, 314) toward religion which is the essence of the religious clauses of the First Amendment. The benefits that the Act provides for religiously-affiliated schools are fundamentally no different from those which the Court upheld as consistent with the Establishment Clause in the *Everson* and *Allen* cases: the provision of financial aid to parents who send their children to such schools. The fact that the State financial aid to the parents "make[s] it more likely that some children choose to attend a sectarian school * * * does not alone demonstrate an unconstitutional degree of support for a religious institution" (*Allen, supra*, 392 U.S. at 244).

2. The Court summarized in *Lemon* v. *Kurtzman*, 403 U.S. 602, the three criteria which it has applied in determining whether a statute satisfies the Establishment Clause (pp. 612–613):

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz* [397 U.S. 664], 674.

The Pennsylvania Parent Reimbursement Act is valid under these criteria. As the district court correctly concluded, the Act has a secular purpose, since it was designed to assist parents in maintaining stu-

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dents in nonpublic schools and to foster educational opportunity for all children.

The district court erred, however, in concluding that the effect of the Act is improperly to advance religion. The issue is not, as the district court viewed it, whether under the Act government funds possibly could be used to promote religion, but whether the primary effect of the Act is to do so. The primary effect of the Act is to aid parents in maintaining students in nonpublic schools, and thereby to foster pluralism in education and to provide parents with maximum freedom of choice in selecting the schools their children will attend. As indicated, the incidental benefit to religiously-affiliated schools resulting from the attendance of some students who might have otherwise been unable to attend does not constitute an unconstitutional support of religion.

The Act does not involve excessive entanglement between government and religion. There is no administrative contact between the State and any religiously-affiliated school. The Act requires only a parental application for reimbursement; it specifically precludes intrusion by the administrative authority into the programs or operations of nonpublic schools. The program is financed by a self-executing fund which does not rely on legislative appropriations, so that the potential for political divisiveness is minimized.

A. *The Pennsylvania Parent Reimbursement Statute has a secular purpose*

The stated purpose of the Parent Reimbursement Act was to reimburse parents in part for the vital

service they perform for the State in maintaining students in nonpublic schools and to foster educational opportunity for all children (App. 58a). The legislative findings in the Act reflect the concern of the Pennsylvania General Assembly that an intolerable public burden would be placed upon the taxpayers of the State and that present standards of public education would be seriously jeopardized if a substantial number of parents of children who attend nonpublic schools were forced by economic circumstances to send their children to public schools (App. 57a–58a).

The Act also furthers the legitimate state interest in maintaining pluralism in education, and thus permitting a wider range of educational experimentation and recognition of special educational needs than would be available if there were no alternative to public primary and secondary schools.

As the district court correctly concluded, "the Act expresses a legitimate secular objective consistent with the Establishment Clause" (App. 43a). An Act designed to avoid heavy tax burdens and to safeguard the quality of education in all schools has a secular purpose. Cf. *Lemon* v. *Kurtzman, supra,* 403 U.S. at 613. There is nothing in the record which undermines the stated legislative intent or indicates that the purpose of the Act was to advance religion. *Lemon* v. *Kurtzman, supra,* 403 U.S. at 613; *Board of Education* v. *Allen, supra,* 392 U.S. at 243.

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B. *The primary effect of the Pennsylvania Parent Reimbursement Staute neither advances nor inhibits religion*

Under the criteria applied by this Court, a legislative enactment violates the Establishment Clause if its principal or primary effect is to advance or inhibit religion. The district court concluded that a "statute has the effect of advancing religion if the terms of the statute fail to preclude a possible use of government funds to promote religious exercises" (App. 49a); and that the Act was invalid because its effect "is to aid the schools" without insuring that "the funds are restricted to secular education or general welfare services" (App. 51a) and "because it aids parents in providing a religious education for their children" (App. 54a). The conclusions, however, do not show that the *primary* effect of the Act is to aid religion.

1. The mere fact that the Act may aid religiously-affiliated schools does not itself invalidate it, for "[t]he simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago * * *." *Tilton* v. *Richardson, supra,* 403 U.S. at 679. The Court has upheld, as consistent with the Establishment Clause, such aids to religious institutions as the reimbursement of parents of school children for bus transportation expenses in attending parochial schools (*Everson* v. *Board of Education,* 330 U.S. 1), the lending by the state of textbooks to all school children, including those attending religiously-affiliated schools (*Board of Education*

v. *Allen*, 392 U.S. 236), and federal grants to Catholic colleges to be used for secular purposes (*Tilton* v. *Richardson*, 403 U.S. 672). As the Court explained in *Tilton* v. *Richardson*, *supra*, 403 U.S. at 679, "[t]he crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."

In *Everson* the Court upheld the reimbursement to parents of Catholic school students of public bus fares expended in traveling to and from school, although the Court noted (330 U.S. at 17):

> It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State.[6]

Similarly, in *Allen*, the Court stated (392 U.S. at 244):

> Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demon-

[6] Considering the changed economic conditions in the 25 years since *Everson*, the financial assistance provided to parents by the payment of the bus fares in *Everson*, which averaged $40 per year per child (*Everson*, *supra*, 330 U.S. at 56, n. 51, Rutledge, J., dissenting) may not be too different in its practical effect on the family's ability to maintain a child in a nonpublic school than the reimbursements provided under the instant Pennsylvania Act.

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strate an unconstitutional degree of support for a religious institution.

For like reasons, the district court erred in holding that the Act also supports religion "because it aids parents in providing a religious education for their children" (App. 54a). As *Everson* and *Allen* indicate, the Establishment Clause does not bar the state from aiding parents in sending their children to religiously-affiliated schools where, in most instances, the child will receive a religious education. To the contrary, such aid, which merely makes it easier for the parents who want to send their children to such schools to do so, reflects, the very neutrality toward religion which the First Amendment requires.

The New York released-time statute upheld in *Zorach* v. *Clauson*, 343 U.S. 306, permitted public school students to be released from school at the request of their parents to receive religious instruction. Therefore it, like the Pennsylvania statute, enabled "parents to augment the public school secular education with religious training" (App. 55a). That fact, however, did not invalidate the New York statute as a prohibited state support of religion.

2. The purpose of the Establishment Clause is to insure that the government is neutral with respect to religious matters, that "no religion be sponsored or favored, none commanded, and none inhibited" (*Walz, supra*, 397 U.S. at 669). It seeks "a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference" (*ibid.*). As

Mr. Justice Harlan explained in his concurring opinion in *Walz* (pp. 694–695):

> * * * These related and mutally reinforcing concepts [of "voluntarism" and "neutrality"] are short-form for saying that the Government must neither legislate to accord benefits that favor religion over nonreligion, nor sponsor a particular sect, nor try to encourage participation in or abnegation of religion.

The Parent Reimbursement Act is completely consistent with these concepts; it promotes voluntarism while remaining neutral. See Areen, *Public Aid to Nonpublic Schools: A Breach in the Sacred Wall?*, 22 Case W. Res. L. Rev. 230, 247–248 (1971). Religion is not favored over nonreligion, nor is participation in or abnegation of religion encouraged. The reimbursement to the parents may not exceed the cost of the child's tuition—and ordinarily will be substantially less than that cost.[7] Thus, the Act's only effect is to reduce somewhat the economic obstacle to sending a child to a nonpublic school.

Rather than encouraging participation in religion, the state here is simply redressing to some extent the burden imposed on parents who send their children to religiously-affiliated schools. The state does not affirmatively encourage parents to use such schools; it merely aids them if they choose to do so. Without such

[7] The approximate amount of a year's tuition can be estimated from the fact that the cost to Pennsylvania of public school education in 1970–1971 was almost $1000 per pupil (Brief of Appellant Grace Sloan, p. 9).

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aid, those parents would be required not only to provide their share of the taxes which support the public schools, but also to bear alone the entire cost of the private school tuition. The Establishment Clause does not bar the state from increasing the parents' opportunity to make a free choice between sending their children to nonpublic or public schools by alleviating this double economic burden.

The Act leaves it completely within the discretion of the parent to decide whether to send his child to a private school and, if so, to which one. Since the tuition reimbursement is available for any child who attends a nonpublic school that satisfies the State's educational requirements, parents may obtain reimbursement for children who attend private schools that have no religious affiliation. The Pennsylvania statute does not favor religious over non-religious private schools.

In short, the State plays no role in the parents' decision whether to send a child to a religiously-affiliated school. What the Act does is to reduce one of the obstacles—the high cost of private school education—that might inhibit the parent from making a free choice between a religiously-affiliated and a public school. The Pennsylvania Act promotes voluntarism by alleviating one of the obstacles to the free exercise of the parents' religious preferences, but in a neutral manner which does not involve the government in any support or sponsorship of religion.

3. The fact that the aid goes to the parent and not to the school is crucial. In *Lemon* v. *Kurtzman, supra,* the Court pointed out (403 U.S. at 621):

> The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen*, for in both cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school. * * *

Where the grant is made directly to the religiously-affiliated school, this Court has indicated that it is constitutionally necessary to insure that the aid so provided is used solely for secular functions. The state statutes in *Lemon* v. *Kurtzman*, 403 U.S. 602, were struck down because, in attempting to meet this constitutional requirement, they impermissibly entangled the State in religious affairs. *Id.* at 619. Similarly, in *Tilton* v. *Richardson*, 403 U.S. 672, it was necessary to provide that the federally-financed buildings of the religiously-affiliated colleges would continue to be used for secular purposes. *Id.* at 682–684.

In contrast, when the benefit is indirect, the fact that religious as well as secular functions may be assisted does not of itself render state action inconsistent with the First Amendment. In *Walz* v. *Tax Commission*, 397 U.S. 664, this Court indicated in approving a tax exemption which benefited both the secular and religious functions of the institutions involved that the fact that the benefit was indirect, rather than direct, was significant. *Id.* at 674–675. And in *Zorach* v. *Clauson*, 343 U.S. 306, the release of children from public school for religious instruction directly benefited the parents of the children; the

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indirect benefit to the religious institutions involved was not primarily to their secular functions. Nevertheless, this Court held the New York statute was consistent with the First Amendment.

Furthermore, as noted above, this Court recognized in both *Everson* and *Allen* that religiously-affiliated schools might receive benefits from the state actions there involved in the form of increased attendance. This benefit was not limited to the schools' secular functions. Nevertheless, the aid was indirect, and the benefit was permissible.

4. The application of the Establishment Clause to various forms of state assistance to religiously-affiliated institutions involves questions of degree. The form the aid takes may therefore be important because that factor often determines whether the state improperly is directly aiding religion or permissibly is merely giving parents and children financial assistance which indirectly benefits the schools. The decisions of this Court have drawn the line between direct aid to religiously-affiliated schools, which can only be given if aid is limited to the secular aspects of those schools and the state is not excessively entangled with religion (*Lemon* and *Tilton*); and aid to the parents and children, which is permissible even though its effect is to aid the entire school, including its religious aspects, by enabling children who might not otherwise be able to do so to attend such schools (*Everson* and *Allen*).

The present case accordingly cannot be disposed of on the oversimplified argument that since the state

could not make these grants directly to the schools, it cannot do so indirectly by reimbursing parents for part of the tuition they have paid to the schools. The determination whether a particular program of state assistance to religiously-affiliated schools violates the Establishment Clause requires a more sophisticated and subtle analysis. Under that analysis, the effect of the Pennsylvania parent reimbursement plan is primarily secular because the aid is given not to the schools themselves but to the parents, in order to assist the latter in sending their children to the schools of their choice. Such aid does not violate the Establishment Clause. Cf. *Lemon* v. *Kurtzman,* No. 71–1470, decided April 2, 1973, sl. op. 14 n. 7.

C. *The Pennsylvania statute does not involve excessive government entanglement with religion*

The remaining inquiry under the Establishment Clause is whether the Pennsylvania statute involves "an excessive government entanglement with religion." *Walz* v. *Tax Commission, supra,* 397 U.S. at 674. We submit that it does not.

The administrative relationships between government and religion under this Act are minimal. Because this Act, unlike the statute in *Lemon* v. *Kurtzman, supra,* 403 U.S. at 621, provides payment to the parent and does not have the "defect of providing state financial aid directly to the church-related school," the State is not required to police the schools to insure that the aid is used solely for its specified secular purposes. The Act bars the Pennsylvania Parent As-

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sistance Authority,[8] which administers the program, from exercising any "direction, supervision or control over * * * any * * * aspect of the administration or operation of any nonpublic school or schools" (App. 60a). A parent wishing to participate in the program merely files with the Authority a simple application stating that his child has completed the school year in a nonpublic school, identifying himself, the student, and the school, and including a receipted tuition bill or a copy of a contract obligating him to pay the tuition (App. 61a).[9]

Upon the filing of this statement, the Authority makes the reimbursement payment to the parent ($75 for each elementary school student and $150 for each secondary school student, but not more than the actual amount of tuition paid); it may employ means reasonably necessary to determine the accuracy of the statements (App. 61a), but may not become involved in any aspect of the administration or operation of any nonpublic schools (App. 60a).

The role of the state under this plan involves less governmental entanglement in religion than the application of state compulsory attendance laws to religiously-affiliated schools. There the state is required to examine the curriculum and instruction to insure that they meet the state standards. The state's role

[8] The five members of the Authority are appointed by the Governor for five-year terms, and serve without compensation (App. 59a).

[9] A copy of the application form is reproduced at pages 86a and 86½a of the Appendix.

in the application of those laws to religiously-affiliated schools has long been recognized as consistent with the Establishment Clause. See *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534; cf. *Walz* v. *Tax Commission, supra,* 397 U.S. 664. The lesser state involvement under the Pennsylvania Parent Reimbursement Act similarly does not violate the Clause.

The state's role here falls far short of the excessive entanglement condemned in *Lemon* v. *Kurtzman, supra.* Each of the plans there involved state payments of part of the salaries of teachers in nonpublic schools. In one plan, the payments were made to the teachers, in the other they were made to the schools. In both plans, the payments covered only the teaching of specified secular subjects.

The Court recognized that because "a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. * * * [T]he potential for impermissible fostering of religion is present" (403 U.S. at 618–619). It noted that to insure that "subsidized teachers do not inculcate religion * * * a comprehensive discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected" (*id.* at 619). The present plan, however, involves no such state surveillance, but only the ministerial functions of checking the accreditation of the schools and paying the parents. Cf. also *Lemon* v. *Kurtzman,* No. 71–1470, decided April 2, 1973, sl. op. 9–11.

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Unconstitutional entanglement may also result from the divisive political potential of a state program—particularly the involvement of the legislature in making annual appropriations to finance the programs. *Lemon* v. *Kurtzman, supra*, 403 U.S. at 622. The Parent Reimbursement Act has no such potential. The State will not periodically be involved in determining either the amount to be expended on the program or the amount to be paid to individual parents in particular years. This program is self-financing. All the moneys are supplied by the Parent Reimbursement Fund, to which is transferred 23 percent of the State's revenues from its cigarette tax. Since the statute specifies a flat dollar amount of reimbursement for each child—$75 for elementary school students and $150 for secondary school students—it does not require any exercise of discretion by state authorities in determining the size of payments to parents.[10]

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[10] These factors distinguish the Pennsylvania Parent Reimbursement Act from the Ohio Parent Reimbursement Act which was invalidated in *Wolman* v. *Essex*, 342 F. Supp. 399 (S.D. Ohio), affirmed, 409 U.S. 808. The Ohio fund used to provide aid to the parents of nonpublic school children was dependent upon annual legislative appropriations (342 F. Supp. at 403, n. 3). The total amount of State funds to be distributed to parents was to be determined by the State Department of Education. In addition, that Department had statutory authority to issue guidelines which would permit reimbursement of various parental expenditures on nonpublic school education (342 F. Supp. at 414). The district court in *Essex* concluded (342 F. Supp. at 418) that "[t]o uphold this statute would be to introduce the religious issue to the very center of state politics." Pennsylvania has avoided this defect by eliminating the need for legislative appropriations and by providing for a purely ministerial administration of the Act that avoids state political involvement in the operation of the program.

* * * * * * *

In sum, the Pennsylvania Parent Reimbursement Plan has none of the features of state aid to religiously-affiliated schools that violates the Establishment Clause. The aid goes to the parents, not to the schools; the State is neutral in its attitude toward the schools; the plan involves no government entanglement in religion. Whatever aid the plan gives to the schools is indirect and constitutes the collateral consequence of easing the financial burden of parents who elect to send their children to nonpublic schools. In thus aiding parents in exercising their freedom to provide their children with an education that differs from that offered in the public schools, including the freedom to select a school that differs from the public schools precisely because it combines religious education with secular training, the Pennsylvania plan reflects a "benevolent neutrality" (*Walz, supra,* 397 U.S. at 677) toward religion. It is in the true spirit of the religious clauses of the First Amendment, whose basic intent is to allow each individual to act in the fullest freedom of conscience, without government restraint or encouragement.

Aid of this type, although not as venerable as tax immunity for churches (*Walz, supra,* 397 U.S. at 676–678), nevertheless has been an accepted part of our political system for many years. Under various statutes providing educational benefits to veterans, the government has paid tuition for hundreds of thousands of veterans of recent wars, including many who have attended religiously-affiliated institutions of various kinds. It has never been thought necessary

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that the benefits be limited to those attending purely secular institutions (see, *e.g.*, 38 U.S.C. 1651, *et seq.*). It was a quarter of a century ago that this Court in *Everson* upheld the constitutionality of reimbursement for bus fares for transporting children to nonpublic schools.

Although the present precise form of this type of aid may be novel, the underlying principle is not: that the State acts consistently with the Establishment Clause when it provides financial assistance to parents who send their children to religiously-affiliated schools, even though the effect of such assistance is indirectly to benefit the schools by permitting children to attend them who might otherwise not be able to do so.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted.

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* In lieu of the Solicitor General, who is disqualified for personal reasons.

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